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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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IN THE MATTER OF
IMPLEMENTATION OF SECTIONS 309(J)
OF THE COMMUNICATIONS ACT
COMPETITIVE BIDDING
(PP DOCKET NO. 93-253)

FCC - MAIL ROOM

COMMENTS

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TABLE OF CONTENTS

I.	ORAL BIDDING SHOULD BE USED FOR ALL BTA BIDDING IN THE SMALL BUSINESS\MINORITY\WOMEN\RURAL TELCO SET ASIDE BANDS (BANDS C AND D) AS THIS WILL RESULT IN FULL VALUE PRICING AND DELIVER LICENSES TO THE SMALL\MINORITY\WOMEN OR RURAL TELCO BUSINESS WHICH MOST VALUES THE LICENSE	1
II.	A 10% CREDIT IN THE FORM OF A BIDDING DISCOUNT SHOULD BE GIVEN AS AN "INNOVATOR'S BIDDING PREFERENCE" TO SMALL\MINORITY\WOMEN\RURAL TELCO OWNED BUSINESSES THAT ARE ALSO PCS INNOVATORS. TO QUALIFY AS A PCS INNOVATOR A "BRIGHT LINE" TEST SHOULD BE IMPOSED, AND THE BEST BRIGHT LINE TEST IS TO DEFINE QUALIFYING PCS INNOVATORS AS THOSE SMALL\MINORITY\WOMEN\RURAL TELCO OWNED BUSINESSES WHICH ARE AMONG THE 56 COMPANIES LISTED IN THE COMMISSION'S TENTATIVE DECISION AND MEMORANDUM OPINION AND ORDER ON PIONEER'S PREFERENCE	2
III.	BIDDING SHOULD BE SEQUENTIAL FROM LARGEST IN POP SIZE TO SMALLEST, AND E, F AND G BTA BANDS SHOULD BE BID BEFORE THE D BTA BAND	5
IV.	SMALL BUSINESSES SHOULD BE ALLOWED TO MAKE INSTALLMENT PAYMENTS AND GRANTED A FOUR MONTH GRACE PERIOD UPON FAILURE TO MAKE AN INSTALLMENT PAYMENT. A "DISTRESS SALE" SHOULD BE ALLOWED DURING THIS FOUR MONTH GRACE PERIOD	5
V.	SMALL BUSINESSES SHOULD BE DEFINED AS BUSINESSES WITH NO MORE THAN \$6 MILLION IN NET WORTH WITH AVERAGE AFTER TAX NET INCOME OF LESS THAN \$2 MILLION FOR THE PRECEDING TWO YEARS AND LESS THAN 500 EMPLOYEES	6
VI.	TRANSFERS OF C AND D BAND LICENSES AMONG SMALL\MINORITY\WOMEN\RURAL TELCO OWNED BUSINESSES SHOULD BE ALLOWED AT ANY TIME AS NO UNJUST ENRICHMENT WOULD BE INVOLVED. TRANSFERS OF C AND D LICENSES TO OTHER ENTITIES SHOULD BE ALLOWED AFTER FOUR YEARS OR 50% COVERAGE OF LICENSE AREA	7
VII.	THE COMMISSION SHOULD ADOPT RULES SPECIFICALLY FORBIDDING COLLUSIVE CONDUCT BY LARGER COMPANIES	7
VIII.	THE UP FRONT APPLICATION FEE PAYMENT PROPOSED BY THE COMMISSION IS APPROPRIATE. THESE PAYMENTS SHOULD BE RETURNED TO A WINNING SMALL BUSINESS AFTER THE AUCTION TO THE EXTENT THEY ARE GREATER THAN 10% OF AUCTION BID. FOR SMALL BUSINESS THE PROPOSED 20% AUCTION FEE DEPOSIT SHOULD BE REDUCED TO 10% AND MADE PART OF THE AMOUNT THE SMALL BUSINESS CAN FINANCE THROUGH THE INSTALLMENT PAYMENT OPTION	8
	CONCLUSION	9

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To: THE COMMISSION

**COMMENTS TO
THE NOTICE OF PROPOSED RULE MAKING**

Corporate Technology Partners ("CTP") hereby submits the following comments in response to the Commission's Notice of Proposed Rule Making regarding Competitive Bidding (the "NPRM"). CTP is a small business with net worth of under \$6 million and annual average net income of under \$2 million.¹ It is also a PCS "innovator" by any definition of that term. CTP established the first PCS company in the U.S. and co-invented with Bell Northern Research the first fully defined frequency sharing technology for PCS (i.e. Personal Communications Integrator or "PCI"). It later invented on its own an improved frequency sharing technology, Interference Sensing CDMA ("ISCDMA") which has substantial advantages in cost, capacity, flexibility, exportability and ease of regulation over all other frequency sharing approaches.

- I. **ORAL BIDDING SHOULD BE USED FOR ALL BTA BIDDING IN THE SMALL BUSINESS\MINORITY\WOMEN\RURAL TELCO SET ASIDE BANDS (BANDS C AND D) AS THIS WILL RESULT IN FULL VALUE PRICING AND DELIVER LICENSES TO THE SMALL\MINORITY\WOMEN OR RURAL TELCO BUSINESS WHICH MOST VALUES THE LICENSE.**

¹NPRM, page 24, footnote 31.

Oral bidding results in full value pricing and fairly delivers the license to the small\minority\women or rural telco business which most values the license. Having sealed bids for groups of licenses may make sense for large businesses bidding MTAs or the E, F, or G bands. Larger companies have the financial capability to build and bid for groups of licenses, and often have presence in multiple geographies (*i.e.* are not doing business in and wedded to a single locale). Many small businesses, on the other hand, have the capability only to manage a PCS operation in a single BTA and want that BTA to be where they are located and are currently doing business. Better service can be provided by a small business operating in its own locale. These small businesses should not be denied the opportunity to win their "home" BTA by having it go instead to someone who has bid through sealed bid. Particularly it would be unfair to the small business bidding its "home" BTA if the small business bid orally at a price higher than the sealed bid, but the sealed bid nonetheless won because the total sealed bid amount for all licenses covered by the sealed bid was higher than the total in oral bids for the same group of licenses. If a small\minority\women owned or rural telco business wants a group of C and/or D band BTA licenses, it should be required to bid orally for each of these licenses as they are auctioned.

II. A 10% CREDIT IN THE FORM OF A BIDDING DISCOUNT SHOULD BE GIVEN AS AN "INNOVATOR'S BIDDING PREFERENCE" TO SMALL\MINORITY\WOMEN\RURAL TELCO OWNED BUSINESSES THAT ARE ALSO PCS INNOVATORS. TO QUALIFY AS A PCS INNOVATOR A "BRIGHT LINE" TEST SHOULD BE IMPOSED, AND THE BEST BRIGHT LINE TEST IS TO DEFINE QUALIFYING PCS INNOVATORS AS THOSE SMALL\MINORITY\WOMEN\RURAL TELCO OWNED BUSINESSES WHICH ARE AMONG THE 56 COMPANIES LISTED IN THE COMMISSION'S TENTATIVE DECISION AND MEMORANDUM OPINION AND ORDER ON PIONEER'S PREFERENCE.²

The Small Business Advisory Committee (SBAC) concluded in its Report, cited in paragraph 50 of the NPRM, that the Commission was authorized by the Budget Act to give a 10% credit as an "innovator's bidding preference." This conclusion is supported by the Budget Act, Section 6002(a) which directed the Commission to provide safeguards for small businesses, rural telephone companies, and businesses owned by minorities and women that would: ". . . promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people" (emphasis supplied) Further, the National Telecommunications and Information Administration Organization Act (47 U.S.C. 901 *et. seq.*) states:

²GEN Docket No. 90-314, released November 6, 1992.

"(6) RULES OF CONSTRUCTION - Nothing in this subsection, or in the use of competitive bidding, shall . . .

"G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology . . ."

While this language was primarily directed to grant of Pioneer's Preferences, provision of a special credit for businesses which are not only small but also PCS innovators is clearly in line with Congress's intent to support both small businesses and innovation.

Grant of a 10% credit to PCS innovators would also be in line with the Commission's stated PCS goals of Universality, Speed of Deployment, Diversity of Service and Competitive Delivery. It is the PCS innovator, many of which have been engaged in development of PCS for up to five years, which are best positioned to deploy PCS quickly.³ It is the PCS innovator, working with other PCS innovators, that can best provide universality of service.⁴ Diversity of service is the fruit of the many, differing approaches to PCS technology and services that have been brought forward by PCS innovators. Finally, the small business PCS innovator, competing from the BTA against larger MTA licensees, LECs and cellular operators, is better able through experience in PCS to compete successfully (provide competitive delivery) than would many non-innovator small businesses.

The recommendation of SBAC is that:

"To qualify for the credit, bidder would have to qualify as (a) a member of a designated group, or (b) as a consortia owned and controlled by firms owned by members of the designated groups. The business development proposal could establish eligibility for credits based on multiples of expenditures for research and development on spectrum efficiency incurred by the applicant; the projected value of the bidder's commercial activities to the community of license; or the value of public service the bidder proposes to offer."

The SBAC Report does not, however, address how one becomes a member of the "designated group." We propose that to avoid controversy and potential litigation a "bright line" test should be imposed. The bright line test we propose is that the small business PCS innovator status be given to those small businesses which are among the 56 companies addressed in the Commission's Tentative Decision and Memorandum Opinion and Order ("Tentative Decision") and have at the same time met all their filing requirements under

³CTP has been engaged in PCS development since mid-1988.

⁴CTP is a founding member of the National PCS Consortium which has as one of its stated goals the provision of a seamless interoperable national PCS network.

their experimental license(s). While the Tentative Decision was directly solely to Pioneer's Preferences, and the issue of Pioneer's Preferences for PCS is subject to a new NPRM, those on the list of 56 were duly singled out by the Commission for potential special recognition for their work on PCS; and it seems to us that the list of 56 is thus an appropriate bright line for identifying small business innovators.

Regarding the amount of the credit, at one point SBAC seems to indicate the credit should be based on a "multiple of expenditures" for research and development on spectrum efficiency, or on the "value" of future commercial activities or public service.⁵ Later in the Report, however, SBAC proposes "a ten percent credit for individual small business entities" without any implication that the amount of the credit would vary between zero and ten percent, dependent upon applicant expenditures (or the future value of these expenditures). We think it is correct to set a flat 10% credit for every small business which qualifies as a PCS innovator. As explained, much small business expenditure to date on PCS has been sweat equity expenditure and so is difficult to audit. It would be both time consuming and expensive for the Commission to have to review past expenditures of applicants or measure/keep track of the value of future "commercial activities" or "public service."

The purpose of the credit should be to provide some assurance that PCS innovators will in fact be able to gain licenses in the auction bidding. As noted above, these are companies which can best meet the Commission's goals of Universality, Speed of Deployment, Diversity of Services and Competitive Delivery. It thus makes sense for the future of PCS to give qualifying small business innovators their 10% credit in the form of a 10% bidding discount. This will enable PCS innovators to win auctions where otherwise overbidding by third parties, companies which are perhaps bidding recklessly because of lack of knowledge, would deny the PCS innovator the license.

In the bidding, the PCS innovator should be allowed to use the 10% discount only in twenty BTA bid groups (a bid group being one 20 MHz BTA for an area, or a 20 MHz BTA plus one or more 10 MHz BTAs for the area, or one or more 10 MHz BTAs for the same area). This should allow the PCS innovator to win at least one license while restricting the PCS innovator to a reasonable number of wins. If the PCS innovator chooses to group with other PCS innovators to bid on BTAs (*i.e.* to form a bidding consortium), the consortium will only be entitled to the 10% discount if at least 20% of its members are PCS innovators and the consortium is composed totally of small businesses, and businesses owned by minorities, women and rural telcos. The consortium can then bid BTAs with 10% bid discounts given to the consortium for each of its members which is a PCS innovator (*i.e.* for each PCS innovator member of the consortium, the consortium will be allowed to bid 20 BTA areas with 10% discount on each of these BTA bids).

⁵SBAC Report, page 15.

The list of BTAs for which the 10% discount will be sought to be applied by the small business or consortium should be supplied to the Commission prior to auction bidding.

III. BIDDING SHOULD BE SEQUENTIAL FROM LARGEST IN POP SIZE TO SMALLEST, AND E, F AND G BTA BANDS SHOULD BE BID BEFORE THE D BTA BAND.

Bidding for MTAs should be in descending order by POP size with the highest two bids winning the A and B MTA licenses. Then bid the 20 MHz C band BTA licenses in descending order by POP size. Then bid the G band BTA licenses in descending order by POP size. Then bid the E and F band BTA licenses together in descending order by POP size with the highest two bids winning the E and F band licenses. Then bid the D band BTA licenses in descending order by size. As previously noted, all bidding for bands C and D should be oral. We feel this approach has advantages of simplicity, of fairness to small business (*i.e.* everyone in bands C and D knows what everyone else bids), and of gaining maximum auction return.

IV. SMALL BUSINESSES SHOULD BE ALLOWED TO MAKE INSTALLMENT PAYMENTS AND GRANTED A FOUR MONTH GRACE PERIOD UPON FAILURE TO MAKE AN INSTALLMENT PAYMENT. A "DISTRESS SALE" SHOULD BE ALLOWED DURING THIS FOUR MONTH GRACE PERIOD.

Small businesses should be allowed to use installment payments with interest at one percent over prime as set out in footnote 57 of the NPRM. The installment payment period should be 10 years, the same as the license. As noted in paragraph 69 of the NPRM, small business has a problem of access to adequate financing. However, small business equally has a competitive problem in competing with larger companies (BTA winner against MTA winner) in that the small business must ordinarily pay much more for capital. The proposal that installment payment interest be at 1% over prime is a partial solution.

Provision of the installment payment option to small business should not be subject to any prior determination of credit worthiness. It should be enough that the small business has been able to pay the up front application fee for the license, and to file a proper short and long form application as set out in paragraphs 97 and 98 of the NPRM. Installment payments should be non-recourse to individual shareholders (if a corporation) or partners (if a partnership bids).

In the event a licensee is unable to make a future installment payment(s), there should be a four month grace period allowing the licensee to seek approaches for financial restructuring and payment of past-due installments. During this period, the licensee may make a distress sale to another small business, or a women or minority owned business, or

a rural telco, at no more than 75% of appraised license value. At the end of the four month period, if past-due installment payments have not been made, the Commission will have the option of reauctioning the license. Buyers in distress sale and bidders at reauction will be required to take over all installment payments due the government, including past-due installment payments. In the case of reauction, any amounts received by the government over and above the past-due installment payments should be paid over to the defaulting license holder.

V. SMALL BUSINESSES SHOULD BE DEFINED AS BUSINESSES WITH NO MORE THAN \$6 MILLION IN NET WORTH WITH AVERAGE AFTER TAX NET INCOME OF LESS THAN \$2 MILLION FOR THE PRECEDING TWO YEARS AND LESS THAN 500 EMPLOYEES.

CTP agrees with the net worth and income definition of small business advanced in footnote 51, page 24 of the NPRM. We think there should additionally be a number of employees test with the requirement of 500 employees or less for a small business. However, for a small business or minority or women owned business to qualify as an eligible entity for the auctions, the entity should be required to meet certain minimum standards. These include:

- Having been in business at least two years as a company (not as an individual) prior to the auction date as evidenced by tax returns or similar proof acceptable to the Commission, to be filed with the short form application.
- Having actually conducted business activities during at least these two years. This requirement would be satisfied by affidavits or other evidence satisfactory to the Commission, to be filed with the long form application showing that the applicant company had actually been in business. Ideally, this business would be such as to show some qualification to run a BTA company (*i.e.* previous experience of management or the company in PCS, telecommunications, distribution or other activity related to the requirements of running a PCS business).

Unless adequate qualifying standards are established for small, minority and women owned businesses, we suspect some larger companies may "create" small\minority\women owned businesses as "fronts" for them in the BTA auctions; and, more important, licenses may end up under the 51% control of those not competent to manage them.

For a bidding consortium to qualify for bidding, it must be 100% composed of eligible entities. Further, voting control in the consortium must rest with eligible entities, and no one non-eligible entity should have more than a 10% economic interest in the consortium.

VI. TRANSFERS OF C AND D BAND LICENSES AMONG SMALL\MINORITY\WOMEN\RURAL TELCO OWNED BUSINESSES SHOULD BE ALLOWED AT ANY TIME AS NO UNJUST ENRICHMENT WOULD BE INVOLVED. TRANSFERS OF C AND D LICENSES TO OTHER ENTITIES SHOULD BE ALLOWED AFTER FOUR YEARS OR 50% COVERAGE OF LICENSE AREA.

Premature transfer by designated entities (small\minority\women\rural telco owned businesses) should be defined as a transfer to a non-designated entity occurring before four years after license award or 50% coverage of the POPs in the license area, whichever first occurs. In case of premature transfer the transferor should be paid back out of transfer price only its provable out of pocket costs and non-transferable obligations to the date of transfer, including pre-operating costs. All amounts received by the transferor licensee over and above said total costs and non-transferable obligations should be paid over to the government. Premature transfers should be allowed only for cash; or if for stock, then for stock with readily determinable market value. Transfer from a designated entity to another designated entity should not be considered a premature transfer even if occurring relatively soon after license win. This is because the auction process exacts full value for the license, and transfer among designated entities would thus not result in unjust enrichment.

VII. THE COMMISSION SHOULD ADOPT RULES SPECIFICALLY FORBIDDING COLLUSIVE CONDUCT BY LARGER COMPANIES.

CTP supports promulgation of specific rules regarding collusive conduct of larger companies. Certain bid rigging conduct would be barred by existing criminal and anti-trust laws. However, enforcement of these laws in the PCS bidding situation would be difficult, expensive and time-consuming. Specific prohibition of collusive bidding for PCS and similar licenses would thus be appropriate.

The rules should provide as wide as possible restriction on all non-designated large firms (firms other than small businesses, and businesses owned by minorities, women and rural telcos) preventing them from collaborating, sharing information, or discussing with one another any information regarding the substance of bids or bidding strategies prior to the completion of the auction. No bidding consortia which include non-designated large firms should be allowed. To rule otherwise would allow every non-designated large firm that wanted to collude on bidding simply to form a consortium among the colluding parties to legalize the activities.

On the other hand, consortia of small businesses, and businesses owned by minorities, women and rural telcos should be allowed. To qualify as a small\minority\women\rural telco owned consortium, all members of the consortium must be members of these designated groups as defined by the Commission, and no single large company may have more than a 20% economic interest in the consortium. Bidding consortia composed entirely of

designated entities should be free of the anti-collusion rules we here recommend the Commission adopt.

VIII. THE UP FRONT APPLICATION FEE PAYMENT PROPOSED BY THE COMMISSION IS APPROPRIATE. THESE PAYMENTS SHOULD BE RETURNED TO A WINNING SMALL BUSINESS AFTER THE AUCTION TO THE EXTENT THEY ARE GREATER THAN 10% OF AUCTION BID. FOR SMALL BUSINESS THE PROPOSED 20% AUCTION FEE DEPOSIT SHOULD BE REDUCED TO 10% AND MADE PART OF THE AMOUNT THE SMALL BUSINESS CAN FINANCE THROUGH THE INSTALLMENT PAYMENT OPTION.

CTP supports application fee up front payment of \$.02 per megahertz per POP with up front payments to be promptly returned to losing bidders. There should be a minimum up front payment of \$5,000 for each application. However, for small businesses which are winners, up front payments should be returned (whether the \$.02 per megahertz per POP or recommended \$5,000 minimum) to the extent they are over 10% of the winning auction bid.

Winning bidders which are small businesses should have the option of using installment payments for the winning bid deposit proposed by the Commission. Winning bidders which are larger companies should be required to tender the 20% immediately to prevent the need for possible reauction on a subsequent day in the event the winner fails to tender the deposit. Small businesses which are winners must immediately tender their deposit or elect the installment payment option. However, for small business the deposit should be 10%. Consortia composed 100% of small businesses should have the same requirements and advantages as are proposed for small businesses. This means the installment payment option should be afforded a small business consortium on each license it wins. The installment payment option should also apply to the deposit (10% for a small business consortium) that would otherwise be due from a winning bidder, and all up front application payments above 10% of winning auction bid should be returned to the winning consortium bidder.

CONCLUSION

The Commission has proposed many excellent steps to give economic opportunity to small\minority\women\rural telco owned businesses, and these proposals should be made part of the final auction rules. In particular, a 10% auction credit in the form of a bidding discount should be given to small businesses which are also PCS innovators, and for small business the total winning bid amount should be financed on a non-recourse basis through a 10 year installment payment plan.

Respectfully submitted,

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